Nos. 82-524, 82-545, and 82-551

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent

UNITED STATES NUCLEAR REGULATORY COMMISSION, *et al.*,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents

COMMONWEALTH EDISON COMPANY,
THE DETROIT EDISON COMPANY,
EXXON NUCLEAR COMPANY, INC.,
NIAGARA MOHAWK POWER CORPORATION,
OMAHA PUBLIC POWER DISTRICT,
POWER AUTHORITY OF THE STATE OF NEW YORK,
PUBLIC SERVICE COMPANY OF INDIANA, INC., AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS COMMONWEALTH EDISON COMPANY *ET AL.*

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REPLY BRIEF FOR PETITIONERS COMMONWEALTH EDISON COMPANY *ET AL.*

ARGUMENT

I. TABLE S-3 STATES A CONSERVATIVE ESTIMATE OF THE ENVIRONMENTAL IMPACTS OF HIGH-LEVEL WASTE

The Commission has not at any time said that there is *no* environmental impact from high-level waste.[1] Rather the Commission has recognized that after spent fuel (high-level waste) is discharged from a reactor, it may have impacts on the environment (1) during storage, (2) during reprocessing, (3) during subsequent storage at the reprocessing plant, (5) during storage above ground at the repository, (6) after emplacement in repository before sealing and, finally (7) during the period after repository sealing. During these various stages the high-level waste is in gaseous, liquid or solid forms depending on the nuclide of interest and the stage of the disposal process.

The Commission examined, in laborious detail, the pathways for radiological impact from each one of these stages and included in Table S-3 conservative (overstated) calculations[2] of radiological impact through all stages including emplacement in the repository for 20-30 years before sealing. U.S. NRC, NUREG-0116: EN-

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[1] Respondent NRDC establishes several strawmen to be attacked. For example, (1) the Commission did not find that "once the non-volatile high-level radioactive waste is removed from a nuclear power plant, it will be isolated from the environment" (Brief for Respondent NRDC at 21-22); (2) Petitioners Commonwealth Edison *et al.*, do not "contend that, even if the risks of high-level waste disposal are significant, the Commission can exclude them from its generic environmental impact statement on 'policy' grounds" (Brief for Respondent NRDC at 28); and (3) there is not an "absence on any mention of the waste disposal problem in Table S-3" (Brief for Respondent NRDC at 31).

[2] For example, while only about fifty percent of the krypton, ten percent of carbon-14 and one percent of the iodine and the tritium exist as gas in the fuel available (and thus are available for release in the event of rod failure), the Table nonetheless assumes the release of the *total* inventory of these elements *six* months after discharge of the fuel from the reactor.

VIRONMENTAL SURVEY OF REPROCESSING AND WASTE MANAGEMENT PORTIONS OF THE LWR FUEL CYCLE at 4-83 (Table 4.15) (Supp. 1 to WASH-1248) (Oct. 1976) ("NUREG-0116").

Then the Commission turned to an assessment of the pathways for further radiological impact on the environment from the remaining waste products *after* repository sealing including consideration of the periods of time required for transport back into the biosphere in various scenarios, periods for decay (half-lives) of the nuclides, and the likelihood of occurrence of initiating events. *E.g.*, NUREG-0116 at 4-86 through 4-116. This assessment was based not only on the Commission's expertise, but also on a particularly extensive survey of the literature (NUREG-0116 at 4-182 through 4-189) which was supplemented in the record of the Final Rulemaking. As discussed in detail in the Statements of Consideration, the Commission considered that any lack of conservatism in this finding (that there will be no further impact from the high-level waste after the sealing of the repository) is more than compensated for by its overestimates of impact during the preceding six stages of high-level waste storage and processing.[3]

But even then the Commission decided to state, in the Table itself, the existence of 11 million curies isolated from the biosphere in the repository.

At this point, no one questions the adequacy of the record. And a court should defer to the technical expertise of the Commission in its assessment of those impacts. Neither the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4347 (1976 & Supp. IV 1980) ("NEPA") "nor its legislative history con-

[3] For a summary of the extensive Commission consideration of the risks and possible effects of a subsequent repository breach after sealing, see Brief on the Merits for Petitioners Commonwealth Edison *et al.* 27-34 & nn.33-36.

templates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted).

II. THE DECISION BELOW WOULD DESTROY THE PROCEDURAL FRAMEWORK ESTABLISHED BY THE APA AND NEPA

As discussed in our brief on the merits, it is well settled that it is a valid exercise of administrative discretion for an agency to determine certain generic findings by a rulemaking without duplicative consideration in subsequent individual proceedings. Brief on the Merits for Petitioners Commonwealth Edison *et al.* 14-16 & n.18.

In *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 641 (D.C. Cir. 1976) (*"Vermont Yankee I"*), the court of appeals held that "absent effective generic proceedings to consider these issues, they must be dealt with in individual licensing proceedings." In the footnote to that holding, the court stated that no one questioned the NRC's power to deal with the fuel cycle issues by rulemaking, instead of in the context of numerous separate adjudications. *Id.* at 641 n.17. The court concluded: "Thus, until an adequate generic proceeding is held . . ., these issues will be ripe in individual licensing proceedings." *Id.* There was no hint in that decision that generic uncertainties required consideration in individual licensing decisions after a valid rule was issued.[4]

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[4] Now, however, the lower court hints, ominously, that its prior approval of the Table's statement of impacts from the "front end" activities may be withdrawn: "It is impossible for this court to determine whether there are other numerical values in Table S-3 that mask uncertainties . . . . We expect, however, that the Commission's consideration of uncertainties underlying the zero-release assumption will encompass any significant uncertainties underlying other values in the Table S-3." *Natural Resources Defense Council, Inc. v. NRC*, 685 F.2d 459, 486 (D.C. Cir.), *cert. granted*, 51 U.S.L.W. 3404 (Nov. 30, 1982) (footnote omitted) ("Vermont Yankee III"); No. 82-551 Pet. App. 52a (footnote omitted).

This Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.13 (1978) (*"Vermont Yankee II"*), reaffirmed the position that agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties.

The Court then concluded that the only issue remaining for the court of appeals on remand was "whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court." *Vermont Yankee II*, 435 U.S. at 549.

The court of appeals exceeded its authority and this Court's mandate when it invalidated the rule for not permitting continual *de novo* review of uncertainties by licensing boards. *Vermont Yankee III*, 685 F.2d at 483; No. 82-551 Pet. App. 45a-46a.

Respondent NRDC cites to a large body of decisions requiring that environmental impact statements should disclose the uncertainties or risks for the environment which the proposed action entails. Brief for Respondent NRDC 24-27 & nn.42-44. Properly read, those decisions require that an agency should candidly recognize the risks and uncertainties attendant to any important agency act in the process of making that determination.

The agency act in question in this case is the Commission's quantification of the environmental effects of the nuclear fuel cycle. Therefore, the question is whether the Commission candidly and adequately recognized and considered risks and uncertainties in reaching that quantification.

The record in this case stretching back to 1972 is replete with consideration of risks and uncertainties by the Commission in reaching the quantification of secondary environmental impacts stated in Table S-3. Neither the Administrative Procedure Act ("APA")[5] nor NEPA re-

[5] 5 U.S.C. §§ 551, 553-559, 701-706 (1976 & Supp. V 1981).

quires more. *Vermont Yankee II*, 435 U.S. at 549; *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

It is also well recognized that under the system of environmental impact statements for a program, basic policy questions considered in the generic environmental impact statement ("GEIS") are *not* subject to duplicative reconsideration in subsequent individual environmental impact statements ("EISs") on parts of the program. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086-93 (D.C. Cir. 1973). Thus, even if the Rule before this Court were a GEIS (which it is not),[6] NEPA itself recognizes that basic policy questions considered therein are *not* subject to reconsideration in the EISs for individual licensing actions thereafter.

Now that the quantification of impacts is stated in Table S-3, the task of the licensing boards is to consider or weigh *that quantification* in their NEPA analyses for individual reactor licensing proceedings. Those boards are *not* to "second guess" the Commission as to the process of reaching the quantification (including the weight to be given to uncertainties or risks).

III. IT MAY NOT BE NECESSARY TO ADDRESS THE *MINNESOTA* DECISION

The court below identified an engineering uncertainty ("uncertainty concerning the integrity of the permanent repository") and an institutional uncertainty ("uncertainty over whether and when such a repository, or equivalent system of disposal, will be developed") and then styled these uncertainties as "two environmental costs of licensing a plant". *Vermont Yankee III*, 685 F.2d at 483;

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[6] Respondent NRDC mischaracterizes the Rule as a GEIS. Brief for Respondent NRDC 28. The lower court previously recognized that the Rule is not a GEIS or an EIS and that it does not require a GEIS or an EIS. *Vermont Yankee I*, 547 F.2d at 653 n.57.

No. 82-551 Pet. App. 45a. That court proceeded to find the rule invalid because it "prevents licensing boards from considering [these] two environmental costs". *Id.* at 483; No. 82-551 Pet. App. 46a.

Respondent NRDC also relies on these two uncertainties and identifies still others which were adequately dealt with by the Commission in its rulemaking.[7]

Since the Court of Appeals relied on two uncertainties and Respondent NRDC now identifies still more alleged uncertainties, this Court may wish to address simply the issue whether "uncertainties" must be debated in individual licensing proceedings after the Commission has considered them in arriving at a generic quantification through rulemaking. In so doing, it may not be necessary to overrule *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979)[8] although it appears to create a conflict among the circuits. *See Natural Resources Defense Council, Inc. v. NRC*, 582 F.2d 166 (2d Cir. 1978). This Court may find that the lower court's reliance on the institutional uncertainty was misplaced because that issue is the subject of a separate rulemaking and irrelevant to the Commission's quantifications in Table S-3. *E.g., Ecology Action v. Atomic Energy Commission*, 492 F.2d 998 (2d Cir. 1974).

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[7] Respondent NRDC addresses, the risks of "transportation accidents, a sabotage, theft, and other events leading to the breach of the containers in which the waste is to be stored." Brief for Respondent NRDC 38-39. The Commission addressed these risks (uncertainties) in the various stages of the rulemaking. *See, e.g.*, NUREG-0116 at 4-144 through 4-152 (transportation), 4-153 through 4-168 (sabotage and theft) and 4-29 through 4-37 (containers).

[8] Respondent NRDC identifies "the risk that a long-term waste repository will not be built" as the *first* of the important risks (uncertainties) and then, on the same page, states mysteriously that "[t]he validity of the *Minnesota* case is simply not an issue here." Brief for Respondent NRDC at 38 & n.58.

If this Court decides to address the *Minnesota* decision's requirement for consideration of a factual record on the institutional uncertainty explicitly, we suggest that the issue of whether there will be safe and adequate provision for nuclear waste in timely fashion is a fundamental policy question which demands an affirmative answer from Congress in order to have authorized, and continuously reaffirmed, the Nation's program for the production of electricity through the use of nuclear power. As this Court stated in *Vermont Yankee II*, such "fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action." *Vermont Yankee II*, 435 U.S. at 558 (emphasis in original).

The Congress has recently reaffirmed its confidence[9] that the task of nuclear waste disposal can be accomplished and has established an extraordinarily detailed regimen under which the Department of Energy and the Nuclear Regulatory Commission are to proceed. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983). And further, the Congress has provided many mechanisms to keep itself informed as to whether that confidence continues to be justified. There are at

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[9] In its Statement of the Case, Respondent NRDC appears to argue, at one point, that Congress' failure to adopt the McClure Amendment should be read to indicate a lack of confidence that the repository can be engineered to achieve its intended objectives. Brief for Respondent NRDC 7 & n.19. Not only does the very existence of that comprehensive act speak to the contrary but, as Justice Rehnquist noted during the oral argument of another case recently, "the bills that Congress didn't pass have really never carried much weight here." Transcript of Oral Argument at 32, *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, U.S. Sup. Ct. Docket No. 81-1945, (January 17, 1983). The Justice later added, "of course, one of the reasons we don't give a great deal of attention to what Congress didn't enact is perhaps some people voted against it because they thought it was already there." *Id.* at 33.

least fourteen sections of Federal law [10] which require the Commission and others to report to Congress on the commercial nuclear program in general. In addition, there are at least seven sections of Federal law [11] and twenty sections in the Nuclear Waste Policy Act of 1982 [12] which require reports to Congress on the issue of nuclear waste management and disposal.

In these circumstances, we believe it is not appropriate for the federal courts to require debate of the issue in other forums so that a record as to the adequacy of the basis for that Congressional judgment may be subject to judicial review.[13]

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[10] 42 U.S.C. §§ 2016, 5877(a)-(b), 5878 (1976); 42 U.S.C. §§ 2039, 2051 note, 2137 note, 2153 note, 2167(d), 7267, 7321-22 (Supp. IV 1980); NRC Authorization of Appropriations for Fiscal Year 1980, Pub. L. No. 96-295, §§ 109(b)(3), 305(b), 306(b), 94 Stat. 780, 784-85, 790-91 (1980).

[11] 42 U.S.C. §§ 2021a notes, 2021(b), 5842 note, 7924(a)-(c) (Supp. IV 1980).

[12] Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, §§ 114(a)(2), 114(c), 114(d), 117(c), 135(d)(5)-(6), 135(f), 136(a)(2), 136(f), 141(b)-141(c), 217(f)(3)(B), 220, 301(b)(3), 302(a)(4), 302(e)(1), 303, 304(c), 305(a), 306, 96 Stat. 2201, 2214-16, 2223, 2235-38, 2240, 2242-43, 2251, 2254, 2257-58, 2260-63 (1983).

[13] We do not believe that the arguments made by Respondent NRDC in Section III of its brief, and relied upon by Respondent New York State, require discussion in addition to that already presented in our brief on the merits and those of the other Petitioners.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our brief on the merits and petition for certiorari, and those of the other Petitioners, the judgment of the court of appeals, except insofar as it upheld the Commission's finding of economic feasibility, should be reversed and remanded with instructions to dismiss all four petitions for review.

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